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NAFTA at 10: Still Weathering the Storm

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The North American Free Trade Agreement (NAFTA) has just passed its tenth anniversary with considerable fanfare on the part of all three NAFTA governments. While the general consensus has been that the NAFTA has been a boon to all three countries, free trade remains a lightning rod for criticism on many fronts, including the 2004 U.S. election campaign. Yet, in the midst of all the bluster about outsourcing, the loss of manufacturing jobs, and possible reviews of U.S. trade agreements, a more enduring critique of the NAFTA has reemerged that poses a much greater long-term threat to the agreement than short-lived, election-year storms. That threat revolves around the divergent national views of the purpose and function of the dispute-settlement mechanisms and their seeming inability to resolve some of the NAFTA's most vexatious disputes.

In the past couple of months, NAFTA panels in two separate disputes between the United States and Canada have reached impasses that, if not handled carefully, threaten to undermine the viability of the dispute-settlement mechanisms. For the more infamous of the two disputes, softwood lumber, few will be surprised that this decades-long battle has reached a new impasse.¹ Yet, softwood shares a dangerous new similarity with another case, pure magnesium,² that is reviving old critiques and

exposing divergent views as to the proper function of dispute settlement under the NAFTA. Under chapter 19 of the NAFTA, the decisions of administrative agencies charged with applying domestic trade-remedy law can be reviewed by a binational panel. The intent of these reviews is to ensure that domestic laws and standards of procedure have been applied in strict accordance with domestic law. In the event that a NAFTA panel finds domestic law was not applied appropriately, the panel sends—or remands—the case back to the administrative agency “for action not inconsistent with the panel’s findings.”

The problem for the NAFTA is that recent panels in softwood and magnesium have each featured not one, not two, but three remands. In effect, panels and domestic administrative agencies have locked horns. Each panel remand has been followed by an administrative agency response reasserting its claim to having properly applied domestic laws in their investigations. More worrisome still for the NAFTA is that recent administrative responses to panel rulings have come with damning, and familiar, critiques of the entire panel process itself.³

Some of the earliest critiques of the North American dispute-settlement process actually involved the NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (CUFTA), and oddly enough, also involved softwood lumber. In August 1992, Canada, for the first time, invoked the dispute-settlement

¹ Specifically, see Article 1904, Binational Panel Review, “In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Threat of Injury Determination,” Secretariat File No. USA-CDA-2002-1904-07. On October 13, 2004, the United States formally notified Canada of its intent to file an Extraordinary Challenge Committee proceeding in this case.

² See Article 1904, Extraordinary Challenge Pursuant to the North American Free Trade Agreement, “In the Matter of Pure

Magnesium From Canada,” Secretariat File No. ECC-2003-1904-01USA.

³ See USITC, “Views of the Commission, Response to Second Panel Remand,” June 11, 2004; *Inside U.S. Trade*, “U.S., Canada Fight over Implementing NAFTA Ruling on Magnesium AD Case,” October 22, 2004.

provisions of the CUFTA in the third incarnation of the softwood lumber dispute, popularly known as Lumber III. Like the contemporary softwood battle, this earlier iteration also ended up exhausting that agreement's panel provisions and resulted in the formation of an Extraordinary Challenge Committee (ECC). Under both the CUFTA and later the NAFTA, ECCs were to be panels of last resort, struck only in the midst of serious allegations of panelist misconduct or that a panel had overstepped its authority. Like the original binational softwood panel itself, the ECC decision in Lumber III split along national lines.

However, along with the ECC softwood decision came a blistering attack on the whole process by dissenting U.S. panelist Malcolm Wilkey, a retired U.S. Circuit Court judge. Judge Wilkey proclaimed that the original panel's decision "may violate more principles of appellate review of agency action than any other opinion by a reviewing body which I have ever read." The result: the dispute-settlement mechanisms of the CUFTA gave ammunition to critics of dispute settlement in Canada and the United States that the mechanism was flawed. More importantly, it also revealed the gulf in how each country views the purpose of the dispute-settlement mechanism of the CUFTA.

Dispute settlement for Canada has always been about the preservation of U.S. market access, a kind of insurance policy against the vagaries of domestic trade-remedy law; in essence, a mechanism to prevent the arbitrary application of trade-remedy law against Canadian goods. For many Canadians, the failure of the rule of law to resolve the softwood lumber dispute represents a central failing of the NAFTA. In stark contrast, the U.S. view of dispute settlement has always been about ensuring that domestic—not international—legal standards regarding the application, investigation, and review of trade-remedy cases prevail within the North American dispute-settlement process. In effect, the U.S. aim has been to have the CUFTA/NAFTA panel processes affect the application of domestic trade-remedy law as little as possible; hence, a big reason for the frustrating impasse in softwood.

In his strong dissenting opinion in the 1994 ECC softwood decision, Judge Wilkey highlighted this basic divergence in view by charging that the panel process was flawed because panelists were chosen without necessarily having any experience with

standards of review that would be applied by domestic courts. Under the CUFTA, panelists were only required to have expertise in trade policy, but not necessarily domestic standards of appellate review. This problem was most acute, according to Wilkey, with respect to Canadian panelists who were unfamiliar with U.S. standards and could therefore hardly be expected to determine whether U.S. laws had been properly applied. The result: charges of national bias in the entire panel process.

The NAFTA attempted to improve upon this problem by at least requiring that panelists have a deeper background in the jurisprudence of domestic trade remedy. However, as the recent magnesium and softwood cases demonstrate, U.S. administrative agencies are being frustrated by panel decisions that are allegedly still overstepping the bounds of their authority. The findings of the recent ECC panel in magnesium give more support to U.S. agency complaints, saying in part, that "the Panel manifestly exceeded its powers by failing to apply the correct standard of review" and that it "materially affected the Panel's decision."⁴

The ECC panel in magnesium also claimed these problems had not fundamentally undermined the NAFTA panel process, a claim made plausible through a narrow reading of the agreement. However, it is also a claim that is politically tone deaf with respect to its implications for the future of the NAFTA. Rulings such as these and the disputes with U.S. administrative agencies they are fostering, are reopening old questions regarding the constitutionality of the panel process; specifically, the denial of "due process" to U.S. firms under the fourteenth amendment of the Constitution.

Canada may rationalize the dogged pursuit of these cases in lieu of negotiated settlements under the guise of defending the rule of law as embodied in the NAFTA. Yet, there is danger in pursuing these cases too far, particularly when both countries view the panel process so differently and approach it with differing legal traditions. In spite of the success of the NAFTA over the last decade, the political wind in the United States has of late been blowing hard against both international institutions and trade liberalization.

⁴Article 1904, Extraordinary Challenge Pursuant to the North American Free Trade Agreement, "In the Matter of Pure Magnesium From Canada," Secretariat File No. ECC-2003-1904-01USA, 12.

Could the NAFTA and its dispute-settlement procedures come to be seen as another effort by foreigners to restrain American sovereignty, in this case the constitutional rights of American business? Could support for the agreement plummet as the chapter 19 process grinds to a crawl with panel remand after panel remand?

Such an erosion in support for the NAFTA would be bad news for the many millions in North America who have benefited greatly from the agreement.

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